It would seem that *habeas corpus* proceedings are in a class of their own since in some cases they may be of criminal nature and in others of a civil nature. In England the question whether the nature of character of the proceedings in which *habeas corpus* is sought has frequently been a favourite subject for discussion. Perhaps, this question has been most authoritatively discussed in *Amand's* case[1] by reason of the fact that appeal does not lie to the English Court of Appeal from a judgment of the High Court "in any criminal cause or matter." Amand, a Dutch national residing in Britain for a number of years was arrested for deserting from the Dutch Army in Britain in which he was a conscript. His applications for *habeas corpus* were refused by two Divisional Courts in succession. He appealed to the Court of Appeal which held that it had no jurisdiction to deal with the matter. His appeal to the House of Lords was also dismissed. Viscount Simon, L.C. made these observations at page 155: —

"If, however, the application for the writ of *habeas corpus* is refused, and the question arises whether an appeal lies against such refusal, a distinction must be made. If the judgment of the High Court refusing the writ is in any criminal cause or matter no appeal lies. If it is not, an appeal is competent. The distinction between cases of *habeas corpus* in a criminal matter and cases when the matter is not criminal goes back very far."

He then went on to deal with the *Habeas Corpus* Acts of 1679 and 1816 and other cases and added at page 156: —

"It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be 'criminal' although he is not charged with a breach of our own criminal law, and (in the case of the Fugitive Offenders Act), although the offence would not necessarily be a crime at all if committed here. It is the nature and character of the proceedings in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal."

In the same case Lord Wright in his judgment at page 160 stated: —

"It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter."

In *Secretary of State for Home Affairs* v. *O'Brien*[14] the Earl of Birkenhead put it aptly that: —

"The writ affords a swift and imperative remedy in all cases of illegal restraint or confinement."

Appellant is put in a dilemma because the application is both under the Criminal Procedure Code (S.S. Cap. 21) and Article 5(2) of the Federal Constitution. Article 5(2) does not say in what manner an application should be made to the High Court for a writ of *habeas corpus*. Appellant relied on *Nanyang Development (1966) Sdn. Bhd.* v. *How Siew Poh*[15] for the proposition that where an Act of Parliament does not specify in what form an application may be made to the court, the application may be made by Originating Motion. There is no relevant provision concerning costs in a *habeas corpus* application under Chapter XXXIII of the Criminal Procedure Code (S.S. Cap. 21). All these matters were dealt with fully by the learned judge who cited *Johnson* v. *R.*[16] where the Privy Council declared that: —

"The Judicial Committee will henceforth adhere to the practice of the House of Lords under which the Crown neither pays nor receives costs unless the case is governed by some local statute or there are exceptional circumstances to justify a departure from the ordinary rule."

Reference was also made to sections 25(2) paragraph 1 of the Schedule to the Courts of Judicature Act. At page 64 of the Appeal Record appellant mentioned that *habeas corpus* proceedings were quasi-criminal. Before us he also said perhaps such proceedings are quasi-criminal. The position was dealt with by the learned judge. He considered that the matter of costs should be decided under the provision of the Criminal Procedure Code and came, with respect, to the right conclusion that "there could be in these applications no order as to costs under the Criminal Procedure Code and there were no exceptional circumstances to justify a departure from the ordinary rule."

For reasons given, I would also dismiss the appeal and agree that there should be no order as to costs.

Wan Suleiman F.J. concurred with both judgments.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.*

YAAKUB BIN AHMAD v. PUBLIC PROSECUTOR

[F.C. (Gill C.J. (Malaya), Ong Hock Sim & Raja Azlan Shah F.JJ.) June 26, 1975]

[Kuala Lumpur — Federal Court Criminal Appeal No. 2 of 1975]

Criminal Law and Procedure — Identification parade — Accused handcuffed during trial — Whether accused prejudiced.

The appellant had been convicted on a charge of armed robbery. On appeal it was argued (1) that a fair trial of the appellant was prejudiced by reason of the fact that he was kept handcuffed throughout the trial; (2) the verdict of the jury was unreasonable and could not be supported having regard to the evidence of identification by two witnesses at an identification parade which was the only evidence to connect the appellant with the offence.

Held, dismissing the appeal: (1) in the circumstances of this case there was nothing wrong in the judge granting the application that the appellant be handcuffed during the trial and the trial of the appellant was in no way prejudiced;

(2) there was nothing irregular in the identification parades at which the witnesses identified the appellant as the person who had committed the offence with which he was charged;

(3) the summing-up of the learned judge on the evidence in relation to the identification parades was not open to any criticism.

FEDERAL COURT.

Karpal Singh for the appellant.

Lamin bin Haji Mohamed Yunus (Deputy Public Prosecutor) for the respondent.

Gill C.J. (Malaya) (delivering the judgment of the Court): The appellant in this case was tried by a jury in the High Court at Penang on the following charge:

"That you jointly with three others still at large on November 1, 1972, between about 1.00 a.m. and 4.00 a.m., that is between the hours of sunset and sunrise, at house No. 420 Kampong Pertama, Bukit Tengah, in the District of Bukit Mertajam, in the State of Penang, in furtherance of a common intention of all, robbed one Tan Ah Heok, a female Chinese of one pair gold ear-ring valued at $20 and cash $400 and at the time of committing the said robbery were armed with a deadly weapon, to wit, a pistol, and thereby committed an offence punishable under sections 392 and 397 of the Penal Code read with section 34 of the said Code."

He was undefended at the trial. At the end of the case the jury brought in a unanimous verdict of guilty. The learned judge concurred in the verdict, convicted the appellant and sentenced him to 10 years' imprisonment and six strokes, such sentence to run from the date of expiry of the last date of his then period of imprisonment. The appellant had 19 previous convictions.

The appeal was argued before us on two grounds. The first ground was that a fair trial of the appellant was prejudiced by reason of the fact that he was kept hand-cuffed throughout the trial. The second ground of appeal was that the verdict of the jury was unreasonable and could not be supported having regard to the evidence of identification by PW7 and PW8 which was the only evidence to connect the appellant with the offence.

We dismissed the appeal because we found no merit in either of the grounds. It was said in connection with the first ground that the learned trial judge erred in law in allowing the application by the Deputy Public Prosecutor to have the appellant hand-cuffed during the trial. It was further said that the appellant's being hand-cuffed throughout the trial must have inevitably prejudiced the jury against him. It was lastly said that the appellant's being hand-cuffed also indirectly showed him to be a person of bad character in that his having to be hand-cuffed indirectly implied that he was a person of violent disposition or a known dangerous criminal. All this, it was argued, resulted in the appellant suffering a miscarriage of justice.

As an accused person is presumed to be innocent until he is proved guilty, it is not the normal practice to put any restraint on him when he appears before a court to be tried for a criminal offence. Some sort of restraint, however, may become necessary where the accused is violent or has committed a crime of violence or may have attempted to escape. In the present case the learned Deputy Public Prosecutor applied for permission of the court to have the accused hand-cuffed during the trial as he had made several attempts to escape. The court granted such permission. The application was made before the jury was selected. In the circumstances, we were of the view that there was nothing wrong in the judge granting the application and that the trial of the appellant was in no way prejudiced.

As regards the second ground of appeal, we did not think that there was anything irregular in the identification parades at which PW7 and PW8 identified the appellant as the person who had committed the offence with which he was charged. Four other persons were brought before the identification parade, but they failed to identify the appellant. The learned judge, after summing-up at some length the evidence in relation to the identification parades, warned the jury that if there was any suspicion that the appellant was wrongly identified he was entitled to an acquittal. Later in his summing-up he directed the jury as follows:

"When you consider the whole evidence you have got to apply your minds to the evidence as a whole. Has the identification by PW7 and PW8 established beyond reasonable doubt that the accused was one of the four intruders who committed the robbery. If you have any doubt in your own mind about that, the accused is entitled to the benefit of the doubt and an acquittal."

In the light of those directions to the jury we were of the opinion that the summing-up of the learned judge was not open to any criticism.

In the result we dismissed the appeal.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.*

U.N. FINANCE BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Suffian L.P., Ong Hock Sim F.J. & Chang Min Tat J.) Ju.y 3, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 165 of 1974]

Income Tax — Company buying and selling shares — Whether company carrying on business of dealing in shares or making investments in shares — Purchase of shares in housing company — Whether purpose of purchase relevant — Question of fact determined by Special Commissioners — Whether court can interfere — Losses incurred by company through their branch in Singapore — Whether deductible — Double Taxation Relief (Republic of Singapore) Order, 1966, art. IV(1)(a) — Income Tax Act 1967, ss. 4(a) and 40.

In this case the appellants were a finance company whose objects *inter alia* were the accumulation of capital by means of monthly subscriptions or otherwise and also by borrowing money from members, depositors and others. They also had powers to acquire movable and immovable properties by way of investment with a view to resale. The appellants bought and sold shares in a number of companies and in respect of the sale of some shares made a profit on which they were assessed to tax. They contended that the purchasing of the shares was made as a long term investment and the profits made were capital in nature being realization of capital investments. The appellants incurred losses through their branch in Singapore and sought to have these losses taken into account in arriving at their chargeable income. The Special Commissioners held that in buying and selling shares the appellants were carrying on the business of dealing in shares as an adventure or concern in the nature of trade and that the profits realized by the appellants were assessable to tax and they also held that the appellants were entitled to deduct their trading losses in Singapore from their income derived in Malaysia. On appeal it was held in the High Court ([1975] 1 M.L.J. 109) that the Special Commissioners were justified on the facts in arriving at the decision that the appellants were carrying on a business of dealing in shares and therefore that the profits from the sale of the shares were assessable to tax. It held however that the Special Commissioners had erred in law in arriving at the decision that the losses of the Singapore branch were deductible from income of the appellants derived in Malaysia. On appeal to the Federal Court,

Held, dismissing the appeal: (1) there was evidence, which if accepted, amply supported the finding of the Special Commissioners that the appellants were carrying on the business of dealing in shares as an adventure or concern in the nature of trade;